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Future work of the Permanent Forum, including issues of the Economic and Social Council and emerging issues

Cross-border issues, including recognition of the right of indigenous peoples to trade in goods and services across borders and militarized areas

Note by the Secretariat

At its thirteenth session, the Permanent Forum on Indigenous Issues appointed Megan Davis, a member of the Forum, to conduct a study into cross-border issues, including recognition of the right of indigenous peoples to trade in goods and services across borders and militarized areas (see E/2014/43, para. 69). The final report will be released during the fourteenth session of the Forum. An overview of the issues that will be presented in the final report is hereby submitted to the Forum.

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Overview of the study into cross-border issues, including recognition of the right of indigenous peoples to trade in goods and services across borders and militarized areas

I. Introduction

1. Cross-border issues are prevalent in the international normative framework dealing with indigenous rights because the territories and relationships of indigenous peoples often transcend imposed national borders. Colonial and postcolonial processes saw the arbitrary imposition of borders, with no regard for cultural relationships or traditional migration routes.[1] The manifestations of cross-border issues are many and complex because indigenous culture is inextricably linked to land. The right to self-determination, the fundamental norm underpinning indigenous peoples' rights in international law, is affected when indigenous peoples are unable to freely exercise their rights to lands, waters and resources, education and language, access to health care and/or traditional medicines. Indeed, international indigenous trading routes were affected, and often prohibited, with the imposition of borders. Before the colonization period, trade was integral to indigenous cultures and was an "aboriginal world system" predicated upon international trade between aboriginal tribes.[2]

2. Cross-border issues affect indigenous peoples from every region. They are frequently raised at the annual sessions of the Permanent Forum on Indigenous Issues, as reflected in the recommendations cited below, and in the context of thematic sessions such as those on the Doctrine of Discovery. The prevalence of such issues explains why cross-border rights are the subject of article 36 of the United Nations Declaration on the Rights of Indigenous Peoples, which reads as follows:

> 1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
>
> 2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

3. No study could comprehensively capture the full extent of indigenous cross-border issues, which include collective identity, public health and management of natural resources and languages.[3] The present document is a précis of the larger study into cross-border issues, including recognition of the right of indigenous peoples to trade in goods and services across borders and militarized areas. The study is aimed at providing an insight into cross-border issues affecting the world's indigenous peoples, without exhaustively cataloguing every cross-border situation.

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[1] See Jérémie Gilbert, *Nomadic Peoples and Human Rights* (New York, Routledge, 2014).

[2] See Russel Lawrence Barsh, "Indigenous peoples and international order: the aboriginal North-American world system", *Balayi: Culture, Law and Colonialism*, vol. 3 (2001).

[3] See Rachel Rose Starks, Jen McCormack and Stephen Cornell, *Native Nations and U.S. Borders: Challenges to Indigenous Culture, Citizenship and Security* (Tucson, Arizona, University of Arizona, 2011).

It should be noted that the issue is more pronounced in Africa, North America and South America and the Arctic.

II. International law framework

4. Articles 3, 26, 32, 33 and 36 of the United Nations Declaration on the Rights of Indigenous Peoples refer to indigenous peoples' right to self-determination; rights to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired; and right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

5. Article 32 of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), of the International Labour Organization Convention (ILO) states that "Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and cooperation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields".

6. Article 12 of the International Covenant on Civil and Political Rights reads as follows:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country.

7. Article 27 of the Covenant reads as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

8. The Permanent Forum on Indigenous Issues has made several recommendations pertaining to cross-border issues. In 2009, it urged the Nordic States to ratify, as soon as possible, the Nordic Sami Convention, which could set an example for other indigenous peoples whose traditional territories were divided by international borders (E/2009/43, para. 55).

9. In 2010, it recommended that the Governments of Canada and the United States of America should address the border issues, such as those related to the Mohawk Nation and the Haudenosaunee Confederacy, by taking effective measures to implement article 36 of the United Nations Declaration on the Rights of Indigenous Peoples (E/2010/43, para. 98). Article 36 states that indigenous peoples divided by international borders have the right to maintain and develop contacts,

relations and cooperation with their own members as well as other peoples across borders.

10. In 2013, the Permanent Forum expressed alarm at the continuing acts of violence being perpetrated against indigenous peoples by Member States and others. It therefore acknowledged the need for States to establish a monitoring mechanism to address violence against indigenous peoples, including assassinations, assassination attempts and rapes, and intimidation of indigenous peoples in their attempts to safeguard and use their homelands and territories that transcended national borders, including the non-recognition of their membership identification and documents and the criminalization of their related activities. It said that specific attention must be paid to such actions being perpetrated by State and local police, the military, law enforcement institutions, the judiciary and other State-controlled institutions against indigenous peoples (E/2013/43, para. 41).

11. Also in 2013, the Permanent Forum noted that education in the mother tongue and bilingual education, foremost in primary and secondary schools, led to effective and long-term successful educational outcomes. It urged States to fund and implement the Programme of Action for the Second International Decade of the World's Indigenous Peoples. It underlined the need for States to respect and promote indigenous peoples' definitions of learning and education, founded on the values and priorities of the relevant indigenous peoples, noting that the right to education was independent of State borders and should be expressed by indigenous peoples' right to freely traverse borders, as supported by articles 9 and 36 of the United Nations Declaration on the Rights of Indigenous Peoples (ibid., para. 16).

III. Brief overview of issues

12. The following is a conspectus of the issues raised in the study aimed at highlighting the historical significance of indigenous relationships, including trade, that traverse national borders and some of the indigenous human rights issues involved. It involves short extracts from the case studies on Australia, North America and the Arctic.

Australia

13. The Australian continent was once a network of complex trading activity between aboriginal nations. Those cross-border relationships have been captured more recently through the native title system. Trade routes criss-crossed the continent and aboriginal nations traded in goods such as pearl shell, spearheads, stone axes, bailer shell, cabbage palm baskets and turtle shell.[4]

14. Generally, trade routes lay like fine mesh over the land, representing a network of interaction that traditionally linked many differently oriented cultural and language groups. Goods moved initially within the range of recognized kin and then

[4] See *Northern Territory of Australia v. Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group*.

to defined partners living in adjacent territories and then further afield, travelling clockwise or anti-clockwise according to convention.[5]

15. The most commonly known account of international trade in Australia is that of the Yolngu and other aboriginal groups in the far north of the country, who established a long-standing trading partnership in trepang (also known as sea cucumber or bêche-de-mer), prized by the Chinese as an aphrodisiac, with the Macassans from Indonesia, who traded with China during the eighteenth century.[6] The trading relationship included turtle shell, pearl shell and buffalo horn in return for dugout canoes, tobacco, rice, cloth, iron and alcohol. Every wet season between the late 1600s and 1906, Macassan sailors traded with the Yolngu along the coast of the Arnhem Land region. The Yolngu were employed to collect and cure the trepang and paid in knives, food and tobacco, establishing the first Australian export industry.[7]

16. The trading links lasted until they were statutorily prohibited, in particular by South Australia. Thus, indigenous trade routes and concentrations of indigenous power were "inadvertently refocused by the imposed patterns of foreign exploration, exploitation and settlement".[8] Laws prohibiting established trading links and restricting the capacity to freely engage in trade contributed to the cycle of poverty that has endured in indigenous Australia. Today, there are many ways in which cross-border issues arise in relation to criminal law and criminal jurisdiction and native title and land law.

North America

17. Before colonization, indigenous peoples traded with nations such as Great Britain and Spain that wished to "secure alliances and ensure the perpetuation of trading relations for mutual benefit".[9] It is said that "States competed with one another for access to indigenous trade and took steps to insure that their relations with indigenous nations were tranquil".[10] The relationships were recognized in treaties such as the Jay Treaty, signed in 1794, and the Treaty of Ghent, signed in 1814. Over time, the colonizer's desire to exploit natural resources and dominate markets resulted in dishonoured treaties and trading clauses in treaties that continue to this day.

18. Policies were implemented that forced indigenous peoples from their lands, territories and resources. Once the traders had established their factories and forts,

[5] See Kim Akerman, "Material culture and trade in the Kimberleys today", in *Aborigines of the West: Their Past and Their Present*, 2nd ed., Ronald M. Berndt and Catherine H. Berndt, eds. (Perth, University of Western Australia Press, 1980).

[6] See Marcia Langton, *Trepang: China and the Story of Macassan — Aboriginal Trade* (Melbourne, University of Melbourne, 2011).

[7] See *Mary Yarmirr & Ors v. The Northern Territory of Australia & Ors*.

[8] See Clive Moore, "Refocusing indigenous trade and power: the dynamics of early foreign contact and trade in Torres Strait, Cape York and southeast New Guinea in the nineteenth century", *Journal of the Royal Historical Society of Queensland*, vol. 6 (2000).

[9] See Marcus Colchester and Fergus Mackay, "In search of middle ground: indigenous peoples, collective representation and the right to free, prior and informed consent", paper presented at the tenth Conference of the International Association for the Study of Common Property, Oaxaca, Mexico, August 2004.

[10] See Robert H. Berry III, "Indigenous nations and international trade", *Brooklyn Journal of International Law*, vol. 24, No. 1 (1998).

assembled sufficient arms and munitions and secured independent means of food supply, they were able to bargain with the local peoples from positions of greater strength. Trading relations soon became more unequal. The situation was compounded by devastating epidemics of introduced diseases that reduced native numbers and undermined their morale.[9]

19. Indigenous rights were referred to in the Jay Treaty and the Treaty of Ghent, signed by Great Britain and the United States.[11] The Jay Treaty, for example, established a right of passage across the border, including to freely engage in trade or commerce with other indigenous nations and not to have to pay duties. Its article 3 begins as follows:

> It is agreed that it shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's Bay Company only excepted)

20. Over time, however, those rights have been repealed through legislative acts pertaining to citizenship and litigation. There are many regions in North America where cross-border issues affect indigenous peoples, for example along the borders between the United States and Mexico and the United States and Canada, including the specific case of Alaska.

21. For the Tohono O'odham Nation in Arizona, the militarization of the border between the United States and Mexico has impeded the flow of tribal members across traditional lands.[12] The Treaty of Guadalupe Hidalgo established the border in 1848. Over time, State notions of citizenship have sought to displace indigenous notions of identity and sovereignty, thereby impeding the ability of the Tohono O'odham to freely cross the border to engage in religious ceremonies and socialize. The consequences of this unfreedom include environmental problems, difficulties in gaining access to medical treatment and antisocial activity in communities.[13]

22. The Haudenosaunee, or the Six Nations of the Iroquois Confederacy, are a federation of six original indigenous nations in North America (Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscarora). They live along the border between the United States and Canada. However, the border, as drawn by those countries, runs through their territorial and ancestral lands. They have frequently raised cross-border issues at the sessions of the Permanent Forum. Their lands and territories and cross-border rights are acknowledged in the Jay Treaty and the Treaty of Ghent.

23. Today, issues pertaining to cross-border travel include confiscation of property, harassment and denial of identity. The regulation of borders creates stress for communities, for example by affecting access to medical treatment. In addition,

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[11] See Greg Boos, Greg McLawsen and Heather Fathali, "Canadian Indians, Inuit, Métis, and Métis: an exploration of the unparalleled rights enjoyed by American Indians born in Canada to freely access the United States", *Seattle Journal of Environmental Law*, vol. 4, No. 1 (2014).

[12] See Eileen M. Luna-Firebaugh, "The border crossed us: border crossing issues of the indigenous peoples of the Americas", *Wicazo Sa Review*, vol. 17, No. 1 (2002).

[13] See Sara Singleton, "Not our borders: indigenous people and the struggle to maintain shared lives and cultures in post-9/11 North America", Working Paper, No. 4 (Bellingham, Western Washington University, 2009).

States take punitive approaches to breaches of regulations, such as the imposition of financial penalties for failure to report at a port of entry. In addition, reporting requirements are cumbersome and an additional layer of administration. The Haudenosaunee, through the Permanent Forum and the Special Rapporteur on the rights of indigenous peoples, have sought to negotiate a solution to the situation. The Forum considered the issue at its ninth session and recommended that the Governments of Canada and the United States should address the border issues (see para. 9 above). The recommendation has yet to be realized.

Arctic region

24. The larger study involves a case study on the Inuit and the Sami. In the interests of brevity, only the situation of the Sami is described herein. The Sami live in Finland, Norway, the Russian Federation and Sweden and have done so since long before non-Sami settlement.[14] They have a common history, culture, language and traditional livelihoods. The borders that divide their ancestral lands (Sápmi) were constructed from the middle of the eighteenth century. Over time, their regulation became increasingly punitive. For example, the non-Sami attitude towards reindeer husbandry became more hostile, with national borders being closed to reindeer one by one (by Finland and Norway in 1852 and Finland and Sweden in 1888).[15]

25. The Special Rapporteur on the rights of indigenous peoples addressed the issue in a report in which he described the impact of State borders on the composition of the Sami population, noting that they cut through linguistic and cultural communities and constrained reindeer-herding activities and that Nordic Governments primarily followed policies that were aimed at assimilating the Sami into the majority societies (A/HRC/18/35/Add.2, para. 7).

26. The Nordic Sami Convention is an instrument aimed at dealing with cross-border issues and is, according to the Special Rapporteur on the rights of indigenous peoples, "the first attempt anywhere to create a regional treaty specifically concerning indigenous peoples" (ibid., para. 11). It highlights what is regarded as best practice in terms of tackling cross-border issues, namely negotiations and agreements aimed at the recognition of cross-border rights and arrangements by which self-determination can be effectively achieved.

IV. Conclusion

27. The literature on indigenous peoples and cross-border rights suggests, as does international jurisprudence, that bilateral and international agreements are the best way to approach cross-border peoples. For example, the Indigenous and Tribal Populations Recommendation, 1957 (No. 104), of ILO states that cross-border issues should be resolved "by means of agreements between the Governments concerned, to protect semi-nomadic tribal groups whose traditional territories lie

[14] See Patrik Lantto, "Borders, citizenship and change: the case of the Sami people, 1751-2008", *Citizenship Studies*, vol. 14, No. 5 (2010).

[15] See Matthias Åhrén, "The Saami Convention", *Gáldu Čála — Journal of Indigenous Peoples Rights*, vol. 3 (2007).

across international boundaries". In *Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169*, it is indicated that:

> Indigenous peoples' right to maintain and develop contacts and cooperation across national boundaries is by its nature different from other internationally recognised rights of indigenous peoples, as its implementation requires political, administrative and/or legal measures from more than one State. A precondition for the implementation of this right is thus that the States concerned have a friendly and cooperative relationship upon which specific arrangements for the implementation of this right can be established.

28. It is stated in article 36 (1) of the United Nations Declaration on the Rights of Indigenous Peoples that it is the right of indigenous peoples to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders. Furthermore, it is indicated in article 36 (2) that States, in consultation and cooperation with indigenous peoples, must take effective measures to facilitate the exercise and ensure the implementation of this right. This can enable transparent communication between States and indigenous groups and enable indigenous peoples to move freely in order to participate in cultural, social, spiritual, economic and environmental activities. The Nordic Sami Convention is an example of how to deal with cross-border issues. Another example is legislation aimed at cross-border mobility, such as that enacted in Guinea. The larger study will include case studies of cross-border issues in each indigenous region.